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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-480

NATIONAL EDUCATIONAL ADVERTISING SERVICES, INC.,

Petitioner,

vs.

CASS STUDENT ADVERTISING INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F. 2d 1092. Otherwise, Opinions Below, Jurisdiction and Statutes Involved are as stated in the Petition.

QUESTION PRESENTED FOR REVIEW

The questions presented for review in the Petition are inaccurate. The sole question which could properly be presented for review is:

> Whether the Court of Appeals applied the proper legal standards to essentially uncontroverted facts in defining the relevant market to be "the service of representing college newspapers in the placement of national advertising"?

STATEMENT OF THE CASE

The relevant facts and proceedings below are fairly summarized in the Opinion of the Court of Appeals, appended to the Petition at pages 1a-16a, reported at 516 F. 2d 1092, and in the Opinion of the District Court, appended to the Petition at pages 1b-14b. reported at 374 F. Supp. 796. The Statement of the Case in the Petition contains numerous misstatements of facts, misrepresentations of the record, and unwarranted argumentation, most of which are not germane to the question presented for review. As recognized by both Courts below and admitted by the Petitioner itself in its Brief to the Court of Appeals (Brief of Defendant-Appellee, p. 27), the evidence in the record relating to the determination of the relevant market issue is essentially uncontroverted.

Without belaboring or refuting Petitioner's misstatements in detail, the record provides no support for Petitioner's irrelevant and all inclusive assertions that "the advertising representative, whether for college newspapers, metropolitan dailies or broadcast media works on an exclusive basis" (Petition p. 3) and "[i]n college newspapers carrying both local and national advertising, most advertising is local advertising" (Petition, p. 3). It is not true that Respondent had exclusive contracts with all or even a significant number of Chicago-area high school and college newspapers for the placement of local advertising. Respondent's statement carefully overlooks a key finding of the Court of Appeals that:

> ". . . since the college newspapers cannot practically assume the solicitation of national advertisers themselves *and since other advertising representatives specialize by medium*, college newspapers have little alternative to CASS or NEAS if they wish to secure national advertising. Cf. *Telex Corp.* v. *International Business Machines Corp.*, . . . F. 2d . . . (10th Cir. 1-24-75, slip opinion at 47-59)." (emphasis added) (Petition, p. 16a.)

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Case Turns Wholly Upon Application of Well Established Legal Standards to Uncontroverted Facts and Presents No Special or Important Questions

The Petition is plainly insubstantial and presents no special or important reasons for considering it. Petitioner does not suggest that the Court of Appeals announced new or novel legal standards for determining the relevant market, which are in conflict with those well established by this Court. Indeed, Petitioner concedes that the Court of Appeals made its decision based upon an application of the controlling legal standards established by *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U. S. 377 (1956) and *Brown Shoe Company* v. *United States*, 370 U. S. 294 (1962).

Petitioner seeks review because it disputes the Court of Appeals' *application* of those standards to the instant facts. In addition, inconsistently with its agreement before the Court of Appeals that all essential facts were uncontroverted, it now argues that the Court of Appeals overruled the District Court's findings of fact in violation of Federal Rule 52(a).

Neither argument is well founded. However, even if it were assumed *arguendo* that the Court of Appeals erred in its application of the proper legal standards to the facts or reversed a finding of fact of the District Court, such errors would not be of sufficient magnitude to warrant the granting of the Writ.

The legal standards by which the relevant market issue should be determined are well settled by this Court's decisions in *DuPont, Brown Shoe* and more recently in *United States* v. *Grinnell Corp.*, 384 U. S. 563 (1966), *United States* v. *Phillipsburg National Bank*, 399 U. S. 350 (1970), and *United States* v. *Connecticut National Bank*, 418 U. S. 656 (1974). These decisions were recognized and applied by the Court of Appeals,

which was conscious of this Court's admonition in *DuPont* that relevant market determinations could be reversed only upon a showing

> "that erroneous legal tests were applied to essential findings of fact *or* that the findings themselves were 'clearly erroneous' within our rulings on Rule 52(a) of the Rules of Civil Procedure," (351 U. S. at 381) (emphasis added).

The Court of Appeals, in accord with that admonition, reversed based upon its conclusion that the District Court had "misapplied the appropriate legal standards" (Petition, p. 3a). The Court found it unnecessary to set aside the District Court's findings of fact under the "clearly erroneous" standard since the facts essential to the relevant market determination were uncontroverted.

The Court of Appeals' opinion analyzed the uncontroverted facts, measured them against the reasonable interchangeability standard of *DuPont*, and applied with precise detail the *Brown Shoe* submarket indicia, in reaching its conclusion.

This Court's relevant market standards do not focus upon an abstract theoretical judgment as to whether the market under review is "narrow" or "broad". What is critical is whether the service claimed to be the market is reasonably interchangeable, from the purchaser's standpoint, with other available services. As recognized by the Court of Appeals, the college newspapers, the purchasers of the service at issue here, have no reasonable alternative but to use the services of a representative specializing in college newspaper national advertising, due to the fact that advertising representatives specialize by medium. (Petition, pp. 15a.-16a.)*

* Petitioner's repeated reference to Mr. Hanson's earlier duties as a space salesman for the Ladies Home Journal (Petition, pp. 3, 18) are a perfect illustration of Petitioner's basic failure to understand the interchangeability test applied by the Court of Appeals. Just because every salesman performs the same physical tasks in selling his product is irrelevant to whether the service of selling a particular type of product is interchangeable with available substitutes for that service. The decisions of this Court and others have repeatedly recognized that neither similarity nor even identity of function creates reasonably interchangeable products or services within a relevant line of commerce. *E.g., United States* v. *Grinnell Corp.*, 384 U. S. 563, 573-576 (1966); *International Boxing Club, Inc.* v. *United States*, 358 U. S. 242, 249-251 (1959); *Marnell* v. *United Parcel Service of America*, 1971 Trade Cas. ¶ 73,761 at pp. 91,212-91,213 (N. D. Cal. 1971); *Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 358 F. Supp. 780, 790 (S. D. Tex. 1971), *aff'd.* 476 F. 2d 989 (5th Cir. 1973).

The District Court erroneously failed to focus on the service at issue, as required by *Grinnell* (384 U. S. at 573). Rather, it held the relevant market to include "all modes of competition used to present national advertising to college students" (Petition, p. 14b), which in its view included:

> "television, AM and FM radio, commercial newspapers, magazines such as *Playboy, Penthouse, Oui* and *Sports Illustrated,* the college editions of *Time* and *Newsweek* magazines, other college publications, and billboards . . . direct mail advertisments, posters located on campus, student directory ads, advertising samples distributed on campus, commercial magazines distributed predominantly on campus, and 'Beetleboards' . . ." (Petition, pp. 9b-10b).

Such a definition by its terms included virtually all national advertising to the public at large, rather than merely national advertising to college students since all national advertising to some degree reaches college students. By no reasonable basis could a market definition which included all national advertising be justified under the sub-market standards of *Brown Shoe*, given the undisputed facts of this case.

The Court of Appeals ruling here is yet another example of this Court's statement in *DuPont* that in relevant market cases, "[T]he varying circumstances of each case determine the result." (351 U. S. at 395.) Were the Court to grant the Writ, every losing party in a relevant market case would be equally justified in pressing a Petition for Certiorari on this issue. The geometric increase in cases prophesied by the Petition if the Writ is denied (Petition, p. 11), will surely be realized if the Petition is granted. This Court does not sit to review the

unique facts of individual cases. A decision by this Court on the relevant market appropriate to the facts at bar, would have no impact beyond the limits of this specific case.

B. The Reasons for Granting the Writ Stated in the Petition Present Questions Which Have No Basis in the Record

Point II of the Petition begs the question, in assuming that "college newspaper advertising" cannot be a relevant market. Such an argument misses the point of the Court of Appeals' decision, which properly focused on the service at issue as required by this Court's *Grinnell* decision. In doing so, the Court of Appeals properly reversed the District Court, which had failed to analyze whether that service was reasonably interchangeable with other services available to college newspapers to secure national advertising. The Court of Appeals properly concluded, upon a review of all uncontroverted facts, that there were no reasonable alternatives. The Petition attempts to confuse this Court into focusing on "college newspaper advertising" rather than upon the service at issue.

The supposed conflict (claimed in Point III of The Petition) of the decision below with the decisions of other Circuits is nonexistent. The Court below applied the same legal standards utilized by the cases cited by Petitioner. Each court applied these standards to the unique facts before it. No conflict between Circuits can exist when the only purported distinction between decisions is whether the market defined is "narrow" or "broad", a matter dictated solely by the facts of each case. The important point is that the standards utilized by all Circuits deciding the relevant market issue were those mandated by this Court's decisions.

The Petition attempts to categorize the relevant market found by the Court of Appeals to be "narrow". The relevant market found herein is no more narrow than that found in *Grinnell* which properly analyzed the cluster of services at

issue. What Petitioner is really saying is that the service at issue is a relatively small part of the nation's commerce and, therefore, not entitled to be dignified with classification as a relevant market. The short answer is that neither the Sherman Act nor this Court's decisions provide any basis for applying different standards to relevant lines of commerce based upon their size.

Finally, Point IV of the Petition is simply an effort, without saying so, to have this Court decide whether the Court of Appeals improperly overruled the District Court under Rule 52(a). This Court's function, respectfully, is not to review findings of fact, all the more so where both courts below and Petitioner have agreed that the essential facts are uncontroverted.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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